STATE OF MICHIGAN

COURT OF APPEALS

DAVID A. CYNAR,

Plaintiff-Appellant/Cross-Appellee,

and

CAROL A. CYNAR,

Plaintiff/Cross-Appellee/Cross-Appellant,

v

VILLAGE OF DEXTER,

Defendant-Appellee/Cross-Appellant/Cross-Appellee,

and

DAVID KNOPE and GEORGIA KNOPE,

Defendants,

and

SCIO TOWNSHIP,

Intervening Defendant-Appellee.

UNPUBLISHED
January 23, 2001

No. 218104
Washtenaw Circuit Court
LC No. 96-002637-NZ

Before: Sawyer, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Plaintiff David Cynar appeals from a judgment of the circuit court entered in his favor following a jury trial. Plaintiff Carol Cynar and defendant Village of Dexter have filed separate cross appeals. We affirm in part and reverse in part.

Plaintiff David Cynar purchased a residential property located in the Village of Dexter from defendants David and Georgia Knope in 1991.[1] Plaintiff rented out the premises, holding it as an investment property. Plaintiff began storing a large charter bus on the property in the spring of 1992. In September 1992, Mary Ann Lampkin, the Village's zoning administrator, informed plaintiff that he could not use the property for both residential and commercial purposes. He was further advised that if he wished to use the property for his bus business, he would have to apply for a special use permit and not lease the property for residential purposes. Around this same time, September or October of 1992, the last tenant was evicted for non-payment of rent. On October 20, 1992, plaintiff filed an application for the special use permit.

Three months later, on January 22, 1993, the first of four alleged sewer backups occurred.[2] Plaintiffs contend that additional backups occurred on October 17, 1993, September 28, 1994, and January 31, 1997. Plaintiff filed the instant action in 1996 against the Village, alleging negligence, trespass-nuisance and a taking. Thereafter, an amended complaint was filed adding Mrs. Cynar as a plaintiff and the Knopes as defendants. Added were claims for gross negligence against the Village and fraudulent misrepresentation, silent fraud, innocent misrepresentation and negligence against the Knopes.

All claims against the Village except for trespass-nuisance were ultimately dismissed by summary disposition. The matter was submitted to mediation, with the mediation panel awarding $15,000 to David Cynar and nothing to Carol Cynar against the Village. The panel further award $5,000 to David Cynar and nothing to Carol Cynar against the Knopes. Defendants accepted mediation and plaintiffs failed to respond, thereby rejecting mediation. Following a jury trial, a verdict was rendered in favor of David Cynar as to the Village for $13,475, Carol Cynar was awarded nothing, and the jury found in favor of the Knopes.

Following trial, the trial court determined that plaintiffs had not improved their position by at least ten percent and, therefore, awarded mediation sanctions to defendants. Plaintiffs also moved for additur, which was denied. Meanwhile, David Cynar began filing liens on property owned by various individuals associated with the Village, Scio Township and the law firms involved in this litigation. Scio Township was allowed to intervene in this case with respect to the liens. The trial court issued an order dissolving the liens and restricting plaintiff's ability to file additional liens.

Turning to the issues raised by plaintiff David Cynar in the principal appeal, plaintiff argues that the trial court erred in precluding plaintiff from presenting evidence or making claims for lost rental income, loss of business, profits and business opportunities or the contribution of lost profits, etc., to his bankruptcy filings on the basis that such damages were speculative. We disagree.

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[1] Mrs. Cynar was not on the deed. In fact, she even signed off her dower rights to the property.

[2] The Village denies that the fourth incident actually was a sewer backup. Rather, the Village maintains that is was merely water in the basement.

We review evidentiary rulings for an abuse of discretion. *Sackett v Atyeo*, 217 Mich App 676, 683; 552 NW2d 536 (1996). Furthermore, recovery is not permitted in tort for remote, contingent or speculative damages. *Theisen v Knake*, 236 Mich App 249, 258; 599 NW2d 777 (1999). In the case at bar, the trial court precluded evidence from being presented on the claims related to lost rental income on the basis that such damages were too speculative. We agree.

The last tenant to occupy the premises was evicted before the first of the four alleged sewer back-ups. Thus, plaintiff cannot point to the back-up as the cause of the loss of that tenant. Furthermore, there is no indication from the record that plaintiff was unsuccessful in obtaining a tenant due to the sewer backups. Indeed, plaintiff directs us to no evidence which supports the proposition that prospective tenants refused to rent the house due to the backups or, for that matter, any evidence that plaintiff made any effort at all to obtain a new tenant. Therefore, it is speculative at best whether plaintiff would have obtained a tenant for the house had there been no backups or that the backups explain the lack of a tenant.

On the other hand, there is plenty of evidence to suggest that plaintiff put the property to other use after the eviction of the last tenant. Plaintiff also operated a charter bus company, parking his buses on the property and using the house as an office. This use preceded the first backup and continued until after the last backup. Given that part of the house was used as an office and that the property and areas of the house were used to store bus parts, it would seem unlikely that the premises would be rented as a residence. Further, the zoning officials indicated that they would not permit plaintiff to use the property both as a residence under the non-conforming use and for the bus terminal, requiring plaintiff to choose. While there appears to be some question whether the zoning ordinance actually prohibits such dual use, it is clear that the zoning officials would resist such dual use.

In sum, we are not persuaded that plaintiff did, in fact, make any effort to return the property to use as a rental residence after the eviction of the last tenant. Further, plaintiff points to no evidence that the sewer problems are what lead to the lack of a tenant. Therefore, we agree with the trial court that any claim of lost rental income is extremely speculative and, therefore, the trial court did not abuse its discretion in precluding such evidence.

Next, plaintiff argues that the trial court erred in denying plaintiff's motion for additur. We disagree. We review the trial court's decision for an abuse of discretion. *Setterington v Pontiac General Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997). The trial court's consideration is limited to objective considerations concerning the evidence adduced and the conduct of the trial. *Id.*

We are not persuaded that the trial court abused its discretion in denying additur. Plaintiff argues that the only explanation for the jury's award is that it awarded $3,500 for the personal property damage, $7,500 to cure the problem with the installation of a grinder pump, and interest. Plaintiff contends that the lowest amount supported by the evidence would include an additional $10,500, plus interest, at a minimum to compensate for lost use and enjoyment of the property. There are several flaws in plaintiff's argument.

First, plaintiff's analysis of the jury's verdict is speculative at best. The award of $3,500 for personal property damage assumes that the jury concluded that defendant was liable for the

first backup, the only one that caused any property damage. While that assumption might be accurate, it is only an assumption. If, in fact, the jury concluded that defendant was not liable for the first backup, but was liable for one of the subsequent backups (and defendant denied liability as to all four backups), then there would be no personal property damage award to be made and the $3,500 would have been for some other element of damages.

As for the grinder pump installation, the testimony actually established that the cost would be in the range of $5,000 to $7,500 and, therefore, the jury may well have only awarded $5,000 on this item. That, of course, assumes that the jury concluded that the municipality was liable to the extent of being responsible to pay for the cost of curing the problem.

Furthermore, we are not at all persuaded that the evidence establishes any minimum amount of damages for loss of use and enjoyment of the property. The jury could have rationally concluded that only one of the backups was the responsibility of the municipality. In which case, the jury could have concluded that there was no loss of use or enjoyment of the property. That is, if defendant were responsible for only one of the backups (with the other backups being caused by plaintiff's own plumbing problems), then that isolated backup did not impair plaintiff's loss of use and enjoyment of the property, at least not beyond the time necessary to clean up the backup (which amount may well be included in the amount that was awarded).

For the above reasons, we are not persuaded that the trial court abused its discretion in denying additur.

Plaintiff next argues that the trial court erred in concluding that plaintiff was not a prevailing party and, therefore, erred in assessing mediation sanctions against him. We disagree.

The mediation panel awarded $15,000 in favor of plaintiff (and nothing to his wife on her claim), which plaintiff rejected. Accordingly, plaintiff was subject to mediation sanctions unless he obtained a judgment of $16,500 or more. MCR 2.403(O). The verdict was, in fact, for $13,475, thus making plaintiff liable for mediation sanctions.

Plaintiff, however, argues that the trial court did not make the appropriate adjustments to the verdict to determine whether plaintiff was, in fact, a prevailing party or not under the mediation rule. MCR 2.403(O)(3) provides that "a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the mediation evaluation . . . ." Plaintiff concedes that the amount of the adjusted verdict, representing the verdict plus the pre-mediation costs allowed by the trial court, of $15,940.20 comes up short of the amount needed to avoid mediation sanctions. However, plaintiff argues that the trial court erred by failing to include post-mediation taxable costs and any additional, assessable costs, whether incurred prior to or after mediation.

The issue of allowing post-mediation costs is disposed of easily. The clear language of MCL 2.403(O)(3), as quoted above, clearly limits adjustments to the verdict to costs incurred from the date of the filing of the complaint to the date of mediation. The court rule clearly does not allow for inclusion of costs incurred after mediation. Plaintiff's reliance on *Beach v State Farm Mutual Automobile Ins Co*, 216 Mich App 612; 550 NW2d 580 (1996), is misplaced. The only reference in *Beach* to including items arising after mediation was the inclusion of "a

reasonable attorney fee incurred from the date of mediation . . . ." *Id.* at 626. However, plaintiff's brief acknowledges that the attorney fee issue is unique to the *Beach* case and that plaintiff was not seeking the inclusion of an attorney fee in this case.

Plaintiff is correct that assessable costs incurred prior to mediation should be included and, if the trial court failed to include all such pre-mediation assessable costs, those would need to be considered in determining whether plaintiff's adjusted verdict was sufficient to avoid mediation sanctions. However, plaintiff fails to identify any pre-mediation item that should have been included, but was not.

Plaintiff also argues that the trial court should have considered the previously entered order dismissing plaintiffs' claim for injunctive or equitable relief, which was without costs, interest or attorney fees to any party. Plaintiff argues that that order provided that no costs, interest or attorney fees would be assessed at all in this action, including mediation sanctions for the claims that remained. We disagree. There is no indication that the parties intended to dispose of any matters unrelated to the injunctive or other equitable relief claim. It would seem odd that the parties would agree to the dismissal of one claim, without prejudice, and yet agree to waive all costs, interest and attorney fees on the claims that remained. Absent a clear indication of an intent to waive all costs, interest and attorney fees for the entire case, we believe the better view is that the waiver of costs, interest and fees relates only to the claim or claims actually dismissed in that order.

For the above reasons, we conclude that the trial court properly determined that plaintiff was liable for the payment of mediation sanctions.[3]

Plaintiff next argues that the trial court abused its discretion with respect to the amount of mediation sanctions and taxable costs assessed against plaintiff. We disagree. As plaintiff notes, the determination of mediation sanctions is within the discretion of the trial court. *Dean v Tucker*, 205 Mich App 547, 551; 517 NW2d 835 (1994).

Plaintiff first challenges the amount of the mediation sanctions on the basis the attorney fees billed for the Knope co-defendants were less. However, the nature of the claims against the Knopes were substantially different than the claims against the municipality. Accordingly, the amount of the Knopes' attorney fees is not a gauge to measure the reasonable attorney fees incurred by the Village of Dexter.

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[3] Plaintiff also refers us to *Miller v Meijer, Inc*, 219 Mich App 476; 556 NW2d 890 (1996), and *Walker v Farmers Ins Exchange*, 226 Mich App 75; 572 NW2d 17 (1997). However, neither of those cases are relevant to the case at bar. *Miller* merely stands for the proposition that determination of the prevailing party under MCR 2.405 is different than the determination of the prevailing party under MCR 2.625(A)(1). It does not change the determination of the prevailing party under MCR 2.405. With respect to *Walker*, that case merely held that sanctions under the offer-of-judgment rule of MCR 2.405 cannot be offset against the payment of personal protection insurance benefits under the no-fault act. Because this case does not involve no-fault insurance benefits, *Walker* is not applicable.

Plaintiff further argues that the trial court should not have included amounts paid by defendant's insurer, the Michigan Municipal Risk Management Authority, because the Authority was not a party to this action. Mediation sanctions, however, are appropriate for amounts paid by an insurer. See *Neal v Neal*, 219 Mich App 490; 557 NW2d 133 (1996).

As for actual objections to the amounts awarded, plaintiff's brief identifies a few specific items, with little or no discussion of why those items should be considered excessive beyond a general complaint that defendant spent more money on expert witnesses than did plaintiff.[4] In sum, plaintiff has presented us with no reason to conclude that the trial court abused its discretion in the amount assessed.

Next, plaintiff argues that the trial court erred in exercising jurisdiction after the trial in this matter concerning requested injunctive relief arising out of plaintiff's actions following the trial. We disagree. Shortly after trial, plaintiff sent to the Village of Dexter a document entitled "Waiver of Tort." That document purported to create an implied contract as a result of the verdict against the village at trial.[5] The document claims to create an implied contract with anyone who "VOLUNTARILY CHOOSE TO INJURE OR OTHERWISE TRESPASS ON THE PERSON OR LAWFUL PROPERTY OF" plaintiff. It further purports to establish damages in the amount of $1,000,000, payable in gold, for the first such trespass or injury, $10,000,000, also payable in gold, for subsequent incidents (and $100,000,000 if the incident results in death, dismemberment or physical injury to plaintiff).

Several weeks later, plaintiff sent a letter to the Dexter Village President claiming violation of the "Waiver of Tort" and demanding payment in the amount of $61,000,000 (in gold). The claimed violations were as follows:

- On September 14, 1998, the Village displayed a foreign flag and fraudulently passed it off as an American flag while in session.
- On September 28, another flag violation.
- On October 11, the Village allowed sewage blockages and backups to occur [the document does not state whether it was on plaintiff's property].
- On October 12, another flag violation.

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[4] And, for that matter, plaintiff includes in his objections at least one item, the bill of Ms. Putala, which the trial court itself specifically disallowed.

[5] Black's Law Dictionary (5th ed), p 1418, defines "Waiver of Tort" as follows:

> The election, by an injured party, for purposes of redress, to treat the facts as establishing an implied contract, which he may enforce, instead of an injury by fraud or wrong, for the committing of which he may demand damages, compensatory or exemplary.

- On October 14, a denial of a Freedom of Information Act request.
- On October 21, a partial denial of a FOIA request.
- On October 26, yet another flag violation.

Further, in conjunction with his "Waiver of Tort," plaintiff filed approximately two dozen liens with the Register of Deeds, and threatened to file dozens of others, against numerous individuals, including various village employees, members of the law firms involved in this litigation, and others, including Scio Township and its employees (apparently because of a contractual relationship between the village and the township).

A petition was filed in this case for injunctive relief. The trial court granted such relief, invalidating all of the liens previously filed, restraining plaintiff from filing additional liens unless those filings were with the consent of the property owner or with the permission of the court, and directed all Registers of Deeds to refuse to accept for filing any liens by plaintiff unless the consent provision was complied with.

On appeal, plaintiff argues that the trial court erred in granting the requested relief in this case because the request for injunctive relief should have been filed in a separate action. We disagree. It is clear from the language of plaintiff's documents and the individuals against whom the liens were directed that plaintiff's conduct arose directly out of this case. Accordingly, the trial court was empowered to take action under this case file rather than requiring the filing of a new case.

Next, plaintiff argues that the trial court erred by entering an order related to the "Waiver of Tort" issue under MCR 2.602(B)(3) to which plaintiff had objected. While this appears true, that error was corrected when the trial court thereafter entered a new order following a hearing on the objections.

We now turn to the issues raised on cross appeal by plaintiff's wife, Carol Cynar. Her first issue is a restatement of plaintiff's issue regarding the exclusion of evidence regarding lost rent. There is no need to further discuss that issue.

Next, cross-appellant argues that the trial court erred in dismissing her loss of consortium claim. We disagree. The essence of cross-appellant's argument is that her husband suffered physically and mentally (high blood pressure, etc.) as a result of the sewer backups, which led to a loss of consortium. However, cross-appellant points us to no evidence of either (a) an actual loss of consortium or (b) that any physical or mental problems suffered by her husband were, in fact, due to the sewer backups. Accordingly, we are not persuaded that the trial court erred in precluding the loss of consortium claim.

Cross-appellant next argues that the trial court erred in allowing certain documentary evidence to be admitted. Specifically, she objects to the use of psychiatrist and therapist documents. The trial court's decision regarding the admission of evidence is within its sound discretion. *Chmielewski v Xermac, Inc*, 457 Mich App 593, 614; 580 NW2d 817 (1998). Plaintiffs' damage claims included emotional damages such as stress and mental anguish arising

from the sewer backups. The documents were relevant to showing that there were other sources for the stress and anguish than the sewer backups. Accordingly, we are not persuaded that the trial court erred in admitting the documents.

Next, cross-appellant argues that the trial court erred in excluding certain evidence regarding her claim for loss of normal use and enjoyment of the property. Cross-appellant's argument, however, merely adopts the arguments put forth by plaintiff which we have previously rejected. We see no need to revisit the issue here.

Cross-appellant's next argument is that she should have been awarded at least $1.00 in nominal damages rather than the jury award of zero. As noted above, we review the denial of additur for an abuse of discretion. *Setterington, supra*. Given that cross-appellant had never lived on the property nor did she have an ownership interest in the property, it was not unreasonable for the jury to conclude that she suffered no damage from a trespass-nuisance. Accordingly, the trial court did not abuse its discretion in denying additur.

Finally, we turn to the cross appeal of the Village of Dexter. The Village's only issue on cross appeal is that the trial court erred in refusing to impose mediation sanctions jointly and severally as against the Cynars and in allocating only $218.50 of the sanctions against Mrs. Cynar. We agree, at least in part.

In reaching its decision, the trial court apportioned the mediation sanctions between Mr. and Mrs. Cynar by imposing on Mrs. Cynar only the additional amount incurred by defendant which was caused by her being a party, with the remainder imposed upon Mr. Cynar individually. Specifically, the trial court ruled as follows:

> Mrs. Debler [defense counsel] was very candid in stating what I think everyone knew to be the obvious, and that was that there was essentially, with the exception of a very small amount of work, there was nothing that the Village of Dexter had to do in defending this case that they – there was nothing more that was necessitated to be done because of Mrs. Cynar's rejection than had to be done for Mr. Cynar.
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> And accordingly, for that reason, the Court is not going to require Mrs. Cynar to pay for these mediation sanctions jointly and severally. I'm going to order that Mrs. Cynar is responsible for $218.50. That is the amount billed for the supplemental brief regarding the issue of standing.

We believe that the trial court's approach was incorrect. Under the trial court's reasoning, Mr. Cynar should only have been responsible for the amounts incurred by defendant that had to be done because of Mr. Cynar's rejection that would not have been done to defend the claims by Mrs. Cynar. In short, the flaw in the trial court's reasoning is that it overlooks the fact that much of the resources expended by defendant would have been expended even if one of the plaintiffs had accepted while the other rejected. That is, defendant would have had to have done more than merely write a "supplemental brief regarding the issue of standing" had Mr. Cynar accepted mediation and Mrs. Cynar rejected it.

MCR 2.403(O)(6) provides that the "actual costs" for purposes of determining the amount of the sanctions include a reasonable attorney fee necessitated by the rejection of the mediation sanction. Thus, in determining Mrs. Cynar's liability, the question is not how much more expense did defendant incur as a result of her rejection, but what expenses did defendant incur as a result of that rejection, even if it would have incurred those expenses had Mrs. Cynar accepted mediation and Mr. Cynar rejected it. In short, Mrs. Cynar is responsible for any portion of the "actual costs" which defendant would have incurred as a result of Mrs. Cynar's rejection of the mediation award, assuming Mr. Cynar would have accepted it. Likewise, Mrs. Cynar would not be responsible for that portion of the "actual costs" that defendant would not have incurred had Mr. Cynar accepted mediation while Mrs. Cynar rejected it.

Therefore, in apportioning the mediation sanctions, the trial court should have divided the total "actual costs" into three categories: (1) the amount that defendant would *not* have incurred had Mr. Cynar accepted mediation and Mrs. Cynar rejected it, (2) the amount that defendant would *not* have incurred had Mr. Cynar rejected mediation and Mrs. Cynar accepted it, and (3) the amount that defendant would have incurred if either party rejected mediation (i.e., the remainder of the total costs after subtracting the amounts under one and two above). It should have made Mr. Cynar solely responsible for the amount under (1), Mrs. Cynar solely responsible for the amount under (2), and both of them jointly and severally responsible for the remainder.

This conclusion is supported by our decision in *Michigan Basic Property Ins Assn v Hackert Furniture Distributing Co, Inc*, 194 Mich App 230; 486 NW2d 68 (1992). In *Michigan Basic*, Auto-Owners Insurance Company and Michigan Basic Property Insurance Association brought suit for claims arising out of an alleged arson. The mediation panel evaluated the case as a "no cause of action" on all claims. The plaintiffs rejected, while the defendants accepted. The jury returned a verdict in favor of defendants on Michigan Basic's claim, but returned a verdict for Auto-Owners on its claim.

Thereafter, the defendants sought and received mediation sanctions against Michigan Basic. Michigan Basic argued that it should be liable for only three hours' worth of the defendants' attorney's work, the balance representing time spent either exclusively on Auto-Owner's claim or on the two cases jointly. The trial court rejected this argument, concluding that the claims by the two plaintiffs were overlapping and, therefore, much of the time spent by defendants on one claim also affected the other claim. Ultimately, the trial court ascertained that approximately twenty-five percent of the work related exclusively to the Auto-Owners claim and reduced the total costs by that percentage in determining the mediation award against Michigan Basic.

This Court affirmed, opining as follows:

> Plaintiff urges interpretation of the "necessitated by the rejection" language to allow attorney fees only where they could have been avoided had the rejecting party accepted the mediation evaluation. In this case, plaintiff insists that its rejection of the evaluation did not "necessitate" defendants' attorney fees; defendants would have been obliged to present essentially the same defense in response to the suit by Auto-Owners even if plaintiff were no longer a party to the suit.

> Adoption of the interpretation urged by plaintiff would frustrate the purpose of the statute. Indeed, under plaintiff's interpretation, a winning party would be unable to recover its attorney fees in cases where it was facing multiple opponents with identical or overlapping defenses. At a motion for sanctions, each loser would assert that the winner would have incurred the same expenses in defending against the others had the loser accepted mediation. The winning party would end up bearing the burden of its litigation costs, and the sanctions rule would provide no deterrent to protracted litigation. [*Id.* at 235.]

For the above reasons, we conclude the trial court abused its discretion in its apportionment of the mediation sanctions between Mr. and Mrs. Cynar. *Michigan Basic, supra* at 234. On remand, the trial court should apportion the mediation sanctions in a manner consistent with this opinion.

Finally, we note that Mrs. Cynar raises several arguments in her cross-appellee brief in response to the Village's claim on cross appeal regarding mediation sanctions. She raises several arguments concerning why she should not have been liable for any mediation sanctions. However, those issues are not properly before us because they were raised in a responsive brief rather than as an issue in her brief as a cross-appellant. See *In re Herbach Estate*, 230 Mich App 276, 284; 583 NW2d 541 (1998) (while an appellee may raise alternative grounds for affirmance without filing a cross appeal, he may not seek a decision more favorable than that rendered by the trial court without raising those issues in a cross appeal).

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction. Defendant may tax costs.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald